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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA SANTOS ZOLTAN,

Defendant and Appellant.

G041286

(Super. Ct. No. 07CF1671)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Sheila F. Hanson, Judge. Reversed.

Law Offices of Mark S. Devore and Mark S. Devore for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Gary W.  
Brozio and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

A jury convicted Joshua Santos Zoltan of one count of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)). The trial court sentenced Zoltan to the midterm sentence of four years in prison.

We reverse. The trial court erred by giving CALCRIM No. 301 (single witness testimony) without modifying it to address the situation in which an accomplice offers exculpatory testimony. The error was subject to the standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) because it had the effect of altering the burden of proof, and was prejudicial under that standard.

## FACTS

In May 2007, Marshall Nickles and his wife returned from vacation to learn from a neighbor that their home in Santa Ana had been burgled. The burglars had entered by prying open a window at the rear of the house and took computers, liquor, and \$32,000 in jewelry.

In the early afternoon of the day of the burglary, Jennifer L., who lived on the same street as the Nickleses, saw two men sitting in an unfamiliar car parked on the street. She thought this was unusual for her neighborhood and was concerned the two men were casing her home. She was on her way to run errands, but sat for a minute in her car watching the car through her rearview mirror.

When the two men drove away, Jennifer L. pulled out of her driveway and drove slowly down the street, looking to see where they had driven. She noticed the car had turned down a side street and parked, which to her seemed strange. She circled the block and, noticing the two men had driven back onto her street, drove back to her home to make sure it was safe. After checking her home, Jennifer L. circled the block several more times and saw the car parked on her street again. The two men were not inside the car this time. She parked behind the car and wrote down its license plate number.

Jennifer L. drove back to her home, parked her car, and walked to a friend's house a few doors down and across the street. She knocked on the door, but nobody answered. As she turned around to walk away, she saw the two men she had seen in the car running across a driveway next to the Nickleses' home. They were carrying a garbage bag with a purse handle hanging out of it and what appeared to be a jewelry box. They ran directly to the strange car Jennifer L. had seen earlier.

Jennifer L. dialed 911. When the police arrived, she described one of the two men as a slender African-American man with dreadlocks, and the other as a male Hispanic, 20 to 25 years old, with brown hair.

At the time the Nickleses' home was burgled, Santa Ana Police Officer Michael Claborn was investigating a string of burglaries in the neighborhood where the Nickleses and Jennifer L. lived. He ran a search on the license plate number taken down by Jennifer L. The vehicle with that plate number did not match the vehicle description she had provided. Claborn changed a letter on the license plate number and ran the search again. This time, the vehicle matched the description provided by Jennifer L. The car was registered to Marcus Sibley.

The next day, Jennifer L. identified Sibley in a photographic lineup as the driver of the car. Police officers executed a search warrant on Sibley's apartment, where they found marijuana and a laptop bag containing the Nickleses' laptop computer and jewelry. Sibley was arrested.

Jennifer L. later identified Zoltan in a photographic lineup as the passenger in the car. Zoltan and Sibley lived in the same apartment complex, and they had conducted drug transactions with each other. Police officers later executed a search warrant on Zoltan's apartment but found nothing incriminating him.

Sibley pleaded guilty to committing residential burglary and was placed on three years' probation and ordered to serve 365 days in jail. He testified at trial as a prosecution witness. He admitted he burgled the Nickleses' home but denied Zoltan was

the accomplice. Sibley testified he committed the burglary with a man named Salvador, whom he described as “Mexican, medium height, medium build.” Sibley testified he did not know Salvador well when they committed the burglary and had not seen him since. Sibley lived in the same apartment complex as Zoltan and did drug transactions with him.

Zoltan testified. He acknowledged purchasing marijuana from Sibley but denied committing burglary with him. He testified that at the time the burglary took place, he went out to lunch with his girlfriend to break up with her. He produced a receipt he claimed was from the lunch. After lunch, Zoltan went home and about 1:30 p.m. went to Golden West College, where he attended school. He testified he was not in Santa Ana on the day of the burglary. Zoltan is not Hispanic.

#### DISCUSSION

##### *I. The Trial Court Erred by Giving CALCRIM No. 301 Without Modification to Account for an Accomplice’s Exculpatory Testimony.*

Zoltan argues the trial court erred by failing to modify CALCRIM No. 301 to state Sibley’s exculpatory testimony did not have to be supported by corroborating testimony. We agree.

Both sides agreed that Sibley was an accomplice and his inculpatory testimony was subject to the corroboration rule of Penal Code section 1111. Accordingly, the court instructed the jury with CALCRIM No. 335, as modified to read in part: “You may not convict the defendant of burglary based on the testimony . . . of an accomplice alone. You may use the testimony . . . of an accomplice to convict the defendant only if: [¶] 1. The accomplice’s testimony . . . is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice’s testimony . . . ; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime.”

The final paragraph of CALCRIM No. 335, as given, reads: “Any testimony . . . of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony . . . the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.”

The court also instructed the jury with CALCRIM No. 301,<sup>1</sup> modified to read as follows: “Except for the testimony of Marcus Aquino Sibley, *which requires supporting evidence*, . . . the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.” (Italics added.)

The problem with CALCRIM No. 301, as given, is that Sibley also gave exculpatory testimony, which is not subject to the rule of corroboration. Penal Code section 1111 provides that “[a] *conviction* can not be had upon the testimony of an accomplice unless it be corroborated . . . .” (Italics added.) Exculpatory testimony would not support a conviction and therefore need not be corroborated.

The CALCRIM No. 301 instruction read to the jury was therefore erroneous because it instructed that all of Sibley’s testimony—including exculpatory testimony—required supporting evidence, while the testimony of one witness was sufficient to convict without supporting evidence.

## II. *The Instructional Error Was Prejudicial Under the Chapman Standard.*

The Attorney General argues only that the trial court correctly gave CALCRIM No. 335 (the correctness of which Zoltan does not challenge). The Attorney

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<sup>1</sup> CALCRIM No. 301 reads: “[Except for the testimony of \_\_\_\_\_ <insert witness’s name>, which requires supporting evidence,] (the/The) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.”

General does not address CALCRIM No. 301 *at all*. Nor does the Attorney General address whether any error was prejudicial.

Zoltan argues the instructional error here is subject to the harmless error standard of *Chapman, supra*, 386 U.S. 18 because the error altered the prosecution's burden under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution of proving guilt beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

We agree. In *Washington v. Texas* (1967) 388 U.S. 14, the United States Supreme Court held a criminal defendant has a Sixth Amendment right to present to the jury exculpatory testimony of an accomplice. In *Cool v. United States* (1972) 409 U.S. 100, 104, the court held that instructing a jury to ignore defense accomplice testimony unless the jury believed the testimony to be true beyond a reasonable doubt "impermissibly obstruct[ed] the exercise of that right" and "ha[d] the effect of substantially reducing the Government's burden of proof."

The form of CALCRIM No. 301 given at trial similarly obstructed Zoltan's right to present exculpatory testimony of an accomplice, Sibley, who was called as a witness by the prosecution. The instruction altered the prosecution's burden of proof by requiring all of Sibley's testimony, including exculpatory testimony, to be supported by corroborating evidence.

The instructional error was prejudicial under the *Chapman* standard. The *Chapman* standard asks whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.) Jennifer L.'s testimony was the only evidence linking Zoltan to the burglary. Sibley testified he did not commit the burglary with Zoltan. To reach a decision, the jury had to decide whether to believe Jennifer L. or Sibley. The erroneous instruction might have led the jury to believe Jennifer L. and disbelieve Sibley. During deliberations, the jury returned a question asking for a copy of the transcript of Jennifer L.'s testimony.

The question was accompanied by an announcement the jury was deadlocked. The court responded by having the court reporter read Jennifer L.'s testimony in the deliberation room, after which the jury deliberated further, and reached a verdict of guilt.

DISPOSITION

The judgment is reversed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.